IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. .....

LELAND H. CAMERON,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 140 Federal Reporter, 2d 482. The opinion is also printed in full in the record (R. 34-39).

Jurisdiction.

The jurisdiction of this Court is invoked under Title 49, section 646, of the U. S. Code, paragraph (f) of which

applies to this case the provisions of Title 28, section 347.

Judgment was entered in this case by the United States Circuit Court of Appeals on February 4, 1944, and petition for rehearing was denied on March 14, 1944 (R. 40).

Statement of the Case.

This case involves an order of the Civil Aeronautics Board restricting petitioner's airline transport pilot certificate for a period of thirty days, during which he is "permitted to pilot aircraft only while engaged in experimental work directly under the orders and control of the War Department."

The charges before, and the findings of, the Civil Aeronautics Board can best be shown by the terms of the order limiting the pilot certificate. The order (which was later amended with respect to the time when the restriction begins to run), sets forth the complaint in full and reads as follows:

> *Order Limiting Airman Certificate—October 29, 1943.*
>
> A complaint having been filed by the Administrator of Civil Aeronautics alleging that Leland H. Cameron (hereinafter referred to as "Respondent"), the holder of airline transport pilot certificate No. 16198, is not qualified to hold said certificate in that:
>
> "1. Respondent, on or about January 13, 1943, while holder of the aforementioned certificate, piloting an aircraft identified as NX 13365, made a downwind landing approach at the Indianapolis, Indiana Municipal Airport, directly in the path of an Eastern Air Lines aircraft which had commenced its take-off run after being cleared to do so by the control tower, and that he thereby needlessly and recklessly created a risk to life and property.
>
> 2. Respondent, on or about January 20, 1943, while holder of the aforementioned certificate, piloted an Army B-25 aircraft, 113150, acrobatically over and/or within 1,000 feet horizontally of the

Indianapolis, Indiana Municipal Airport, in that he performed a dive followed by a steep climbing turn over buildings located on said airport, contrary to the provisions of section 60.700 of the Civil Air Regulations.

3. Respondent, in executing the above mentioned maneuvers, descended to an altitude of lower than 500 feet above the ground, contrary to the provisions of section 60.3503 of the Civil Air Regulations.

4. Respondent, on said flight, subsequently executed a landing at said airport at right angles to traffic, thereby indicating a reckless disregard for life and property."

The Respondent having waived in writing the statutory right to notice and hearing, and evidence having been received:

Now, therefore, upon due consideration of all the evidence of record in the above-entitled proceeding:

THE BOARD FINDS:

1. The charges contained in the first paragraph of the complaint have been withdrawn;

2. Respondent committed the acts charged in the second and third paragraphs of the complaint;

3. The evidence does not establish the charges alleged in the fourth paragraph of the complaint; and

4. The public interest requires that Respondent's airline transport pilot certificate be restricted for a period of 30 days to permit Respondent to pilot aircraft only while engaged in experimental work directly under the orders and control of the War Department.

IT IS ORDERED, That Respondent's airline transport pilot certificate No. 16198 be and it is hereby restricted for a period of 30 days. Said period of restriction shall commence to run ten days from the date of this order and shall continue until such certificate has been restricted for an aggregate period of 30 days. During such time, Respondent shall be per-

mitted to pilot aircraft only while engaged in experimental work directly under the orders and control of the War Department (R. 2-3).

Section 60.700 of the Civil Air Regulations provides that "no person shall acrobatically fly an aircraft * * * at any height whatsoever over a congested area of any city, town or settlement, or over any open-air assembly of persons, or over any airport or landing area or within 1000 feet horizontally thereof, or within the limits of a civil airway except within that portion lying adjacent to, but outside of a range approach channel." This section must be read with Sections 60.702 and 98.104 of the Civil Air Regulations which provide that: "Aerobatics are unnecessary flight evolutions voluntarily performed with an aircraft requiring or resulting in an abrupt change in its attitude, an abnormal attitude, or operations in excess of the aircraft's design level flight speed (placard value). A normal bank not in excess of 70 degrees will not be considered as an abrupt change in the aircraft's attitude or as an abnormal attitude." Section 60.3503 of the Civil Air Regulations provides that "Exclusive of taking off from or landing upon an airport or other landing area aircraft shall not be flown below the following minimum safe altitudes of flight: * * * 500 feet above the ground or water * * *."

Attention should be called to the fact that the charges in paragraph 1 of the complaint were withdrawn, and that the evidence was found insufficient to support the charges alleged in the fourth paragraph of the complaint. The order was therefore based solely on the charges alleged in paragraphs 2 and 3 of the complaint.

To establish the charges in paragraph 2 of the complaint requires proof of a dive followed by a steep climbing turn over buildings located on the Indiana Municipal Airport, through "unnecessary flight evolutions voluntarily

performed with an aircraft requiring or resulting in an abrupt change in its attitude," and with a bank in excess of 70 degrees.

To establish the charge in paragraph 3 of the complaint requires proof of all charges in paragraph 2 of the complaint, and, in addition, proof of a descent to an altitude lower than 500 feet from the ground in maneuvers charged in paragraph 2, and with such lower flight exclusive of "landing upon an airport."

In its opinion the Circuit Court of Appeals found that:

> "Petitioner has been a licensed airplane pilot for thirteen years and his flying career has been divided into three parts: Army, testing and airline flying. He has accumulated 1300 hours of Army flying time, 300 hours of testing, and 3700 hours of airline flying time, making a total of 5,300 hours in the air. During all of this time his flying has never been questioned by pilots, control tower operators, or by the Civil Aeronautics Authority. For a period of over nine months prior to the date of the charge here involved, he had been engaged in flights of an experimental nature vital to the war effort and necessitating deviation from standard procedure" (R. 36).

This statement is fully supported by the record (R. 12, 21). The Circuit Court of Appeals does not specifically state that the flight to which this charge relates was one of those necessitating deviation from the standard procedure, but this is specifically stated in the record by petitioner's superior army officer (R. 21).

The Circuit Court of Appeals has held that Petitioner's action in the flight involved in this case is subject to the disciplinary power of the Civil Aeronautics Board, and that there is substantial evidence to support the Board's findings. Petitioner contends that these determinations are erroneous. The argument in support of these contentions requires a detailed analysis of the facts and evidence in this case.

Errors relied upon.

The United States Circuit Court of Appeals erred:

(1) In subjecting petitioner in this case to discipline by the Civil Aeronautics Board; and

(2) In finding that there is substantial evidence to support such Board's findings against petitioner.

ARGUMENT.

I.

Petitioner is not subject to discipline by the Civil Aeronautics Board.

The petitioner was acting under army orders and was flying an army plane. His plane was a B-25-C fast army bomber (R. 8, 10), identified as research plane NX 13,365 (R. 2, 22), employed in the development of an instrument landing system (R. 22), and flown in this instance with a United States Signal Corps observer to demonstrate such a system to an English delegate pilot (R. 12).

The petitioner's superior army officer, Colonel Yeager, stated that "these flights were of an experimental nature necessitating deviation from the standard procedure" (R. 21); and Lieutenant Perper of the Signal Corps, who was aboard the airplane as an observer, stated that many radio test flights with petitioner "demanded flying of an unusual nature" (R. 13).

The United States Circuit Court of Appeals, in the present case, not only admits, but find, that these flights of

petitioner "necessitated deviation from standard procedure" (R. 36). But after conceding the necessity of deviation in this flight, the Court says that there was no military necessity; that petitioner was under army orders to fly according to contact flight rules in accordance with Civil Air Regulations; and that: "Nowhere in the evidence submitted by petitioner is it stated or shown that any such act was demanded by Army instructions" (R. 38, 39). The Court then relies upon the fact that the Army Air Force Regulations apply the Civil regulations as far as possible; forgets the necessity for deviations which it has previously recognized; and overlooks petitioner's specific and uncontradicted statements as to following army practice and instructions. There is not a scintilla of evidence against the existence of army instructions and practices deviating from civil standards, and there was no effort to present any such evidence. And every deviation may require some deviating army practice, or a formal or informal deviating army instruction. Diving low and executing a climbing turn are the points at issue (R. 39). The Petitioner said that the army's flight instructions for a B-25 type airplane state: "Pull the nose up sharply to slow the plane down to below 160 P H before extending the wheels and flaps for landing" (R. 11). The petitioner also said: "In the absence of not being able to complete two-way radio communication with the Indianapolis tower, I proceeded, in accordance with standard army practice, of flying close to the control tower so as to attract the attention of the control tower operator and rocked the plane from side to side to let him know that I could hear him, but that he evidently did not hear me, after which I proceeded to a down-wind position from the field and proceeded to make a turn and land" (R. 10).

The Circuit Court of Appeals not only overlooks statements in the record regarding army regulations and prac-

tice, but also fails to recognize differences in types of air planes, and its own statement of the necessity for deviations.

The petitioner was flying as a lieutenant of the Army Air Force and not as a holder of a civil license (R. 23). There is not substantial evidence to support the findings of the Civil Aeronautics Board, but, if there were, the fact that the petitioner followed army regulations would not protect him from being penalized by that Board, if its present position is sustained. We would then have the disciplining of a pilot on the ground that the flight was not in accordance with civil aeronautical regulations, although the flight was in an army plane, under army control, pursuant to army directions, accompanied by army observers, and found to meet fully all army requirements and conditions. He was flying for the army, and under instructions from the army. He obeyed such instructions and was under duty to do so. Obedience of the instructions resulted in no injury and threatened none. The Civil Aeronautics Board penalizes him because it finds that in obeying army instructions he violated civil instructions.

No express authority is vested in the Civil Aeronautics Board to regulate or discipline army transactions of the character here involved. And it has long been established

> "that for an act done in accordance with the usages of civilized warfare, under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority."
>
> *Freeland* v. *Williams*, 131 U. S. 405, 416 (1889).

In a summary of a complete annotation of cases involving the "Civil and criminal liability of soldiers, sailors and militiamen" it is said in 135 American Law Reports, Annotated (1941), at page 37:

> "Recognition of the peculiar necessity of discipline in the military service and of the position in which the

> subordinate may find himself through no fault of his own, in the event that commands of his superiors clash with the civil authority, has led courts in well-considered cases to regard obedience to a military order as a justification for conduct which would otherwise give rise to civil or criminal liability, unless the order is so palpably unlawful that a reasonable man in the position of the person obeying it would perceive its unlawful quality."

Established principles of law relieve petitioner from civil or criminal liability for his obedience of army regulations. The power sought to be exercised by the Civil Aeronautics Board would permit a governmental agency to penalize him for such obedience. The Board would thus have more power than the civil courts have assumed. Through such power the Civil Aeronautics Board may block or control army aviation so far as it involves the use of licensed pilots. It may leave petitioner free to do army flying but may punish him as a civil pilot for observing army regulation in such flying.

The Circuit Court of Appeals says that the rule of *Freeland* v. *Williams*, 131 U. S. 405, 416, does not apply, "since there was no specific military order to violate a civil law or regulation here." Such a position would require a specific order to violate in order to protect every army activity which involves deviation from ordinary civil transactions.

If petitioner was flying for the army and in compliance with army instructions, there is no civil jurisdiction to punish him by withdrawing rights of a civil character. Petitioner alleges that he was flying in accordance with army instructions (R. 12). His army superior confirms this statement (R. 21). There is no contradictory evidence. It is true that the civil rule generally applies as to landing, but specific instructions were here relied on and not denied. There was a different type of airplane and no denial that

it required quicker and higher flight, which is the gist of the charge. Nor is there denial of inability to contact, and of orders under such circumstances to signal close to the control tower by rocking the plane.

The Civil Aeronautics Board here claims authority to penalize petitioner as a civilian flyer because of his obedience of deviating instructions as an army flyer. That it recognizes that it has no power to penalize him merely as an army flyer is shown by the fact that its order in no way interferes with his right to continue to pilot aircraft "while engaged in experimental work directly under the orders and control of the War Department" (R. 3). But the Civil Aeronautics Board would, under its asserted authority, have power to extend the restriction upon use of his civil certificate if he continued army flying under deviating army instructions.

In the position which it takes, the Circuit Court of Appeals relies upon *State* v. *Burton*, 41 R. I. 303, 103 Atl. 962 (1918). That case presented the question of liability of a driver in naval service for the violation of state speed laws, in obedience to instructions, which he was bound to obey, that he proceed with all possible dispatch. The opinion is completely in accord with petitioner's argument. In stating the applicable principle, the Court quoted from *In re Waite*, 81 Fed. 359:

> "The mere fact that when the acts by him done were done he was an officer of the United States, charged with certain duties to that government, will not afford him immunity from prosecution under the laws of the state, nor will the mere fact that he claims that the acts done were within the line of his official duty afford him protection, if the acts are such as to show that the claimed immunity is a clear subterfuge, and that under no fair consideration of his official duty, could he have assumed that he was acting in his official capacity when the acts complained of were done by him."

The Court applied this principle by saying, at page 306:

> "The respondent is a sailor in the service of the United States and was bound to obey the lawful orders of his superior officer. The order in question, although it called for a disregard of the ordinary rules of conduct, was not illegal in the circumstances, but on its face was one which was justified by the rules of war and the situation then existing at Newport. It should protect respondent."

The rule applicable to a federal officer's subjection to local laws was well stated by Mr. Justice Holmes in *Johnson* v. *Maryland*, 254 U. S. 51, at page 56:

> "It very well may be that, when the United States has not spoken, the subjection to local laws would extend to general rules that might affect incidentally the mode of carrying out the employment,—as, for instance, a statute or ordinance regulating the mode of turning at the corners of streets."

The issue here is not one as to state law, but the principle is the same as in *State* v. *Burton*. The petitioner was engaged in an army flight, in an army plane, and was under instructions which necessitated deviation from the standard procedure. The army instructions were dominant, and the United States Army had spoken. Its instructions were legal under the circumstances. They resulted in no injury and threatened none.

II.

The finding of the Civil Aeronautics Board is not supported by substantial evidence.

The evidence against petitioner is not substantial. The Circuit Court of Appeals finds substantial evidence to support the findings of the Civil Aeronautics Board in the "Alleged Violation Report" by Luther E. Dillon, Chief Airport Traffic Controller (R. 30) and "Inspector's Report

of Violation," by Henry M. Hamilton, Civil Aeronautics Authority Inspector (R. 27-29). These two reports are admittedly the only basis for the findings of the Civil Aeronautics Board (R. 37).

The Hamilton report states that "I personally observed these maneuvers" (R. 29). The Dillon report made no such statement but recited that "An alleged violation is indicated" and that "Further alleged violation is indicated" (R. 30). Petitioner claims that the Dillon report is not evidence. The Circuit Court of Appeals says that the report "is in the form customarily used by one who is an eye-witness" and "must be treated as having substantial weight" (R. 35). Petitioner further contends in this Court that the form of language is that customarily used by one who is not an eye-witness, and that this is indicated by the form of an accompanying report. The Dillon report is not that of a witness, and has no weight in this case.

Although Hamilton's report stated that he personally observed the flight (R. 29), petitioner claims that his statement as a witness in this case is also entitled to no weight.

Hamilton's report sets out in full two alleged violations by petitioner, one on January 13 and one on January 20, 1943, and indicates that he saw both violations (R. 29). The incident of January 13 was originally made the basis of the first paragraph of the complaint against petitioner (R. 2, 32). This paragraph of the complaint was withdrawn, evidently, because directly contradicted by Walter H. Gehlaar, co-pilot with petitioner at the time (R. 24), and, further, because an investigation by the Eastern Air Lines at the request of the Civil Aeronautics Administration did not reveal the incidents reported by Hamilton (R. 25-27).

The Circuit Court of Appeals holds, independently of the record, that Hamilton was trained to observe, and that his

report is substantial evidence as to the transactions of January 20 (R. 35-37). That Court says that his credibility is not to be considered by the Court, and that his reliability as a witness is not affected by his ability to report in detail a transaction which did not occur (R. 29); nor by his report that there were no occupants of the airplane with petitioner on January 20, when there were two skilled pilots as observers (R. 3, 8, 13, 28, 37).

With no evidence that Dillon was an observer, the sole basis of finding against the petitioner is Hamilton's report, the major part of which is obviously false. If his observation at one time was so clearly erroneous, this should be considered by the Court in weighing his other observations.

However, if the petitioner had presented no evidence, the record would not support the order restricting his pilot certificate. The charge in the first paragraph of the complaint having been withdrawn, the charges in paragraphs 2 and 3 are dependent upon each other, the charge in paragraph 3 involving what is alleged to have been done "in executing the above mentioned maneuvers" set out in paragraph 2 (R. 2). Even if Dillon were assumed to be an eye-witness, which he was not, and if weight were given to Hamilton's otherwise false report, this Court's attention is called to the fact that the two reports present no evidence in support of the charges of acrobatic flying and of flying lower than 500 feet—the charges in paragraphs 2 and 3 of the complaint. There is no evidence as to flying lower than 500 feet except as an incident to landing, nor as to acrobatic flying as defined by Civil Air Regulations. There is no proof of "*unnecessary flight evolutions voluntarily performed* with an aircraft requiring or resulting in an abrupt change in its attitude, or of a bank in excess of 70 degrees"; and without such proof acrobatics cannot be established (Civil Air Regulations, sec. 60.152). The Circuit Court of Appeals says that "There is sharp conflict

as to whether the plane descended below 500 feet" (R. 37), though there is no proof that it did, exclusive of landing; and the court justifies absence of specific proof of the charges in paragraphs 2 and 3 of the complaint by saying that "it clearly appears from the record that petitioner was fully apprised of the charges against him" (R. 38).

The evidence on behalf of petitioner is controlling. The Civil Aeronautics Board has not made a case against petitioner, even if its evidence were not controverted. At the time of the flight on January 20, 1943, the petitioner was piloting a B-25 C bomber in connection with war experiments under the supervision of Colonel Hobart R. Yeager of the Aid Corps (R. 21). In the flight he was accompanied by 1st Lieut. Lloyd J. Perper of the Signal Corps, who flew as an observer (R. 8, 13), and Squadron Leader R. J. Falk, Chief Test Pilot of the British Royal Aircraft Establishment (R. 3-4, 8).

Petitioner's defense is found in his explanatory letters of June 23, 1943, and March 24, 1943 (R. 9-13, 22-23); a letter from Squadron Leader R. J. Falk (R. 3-4); a letter of Colonel Hobart R. Yeager (R. 21), and a statement by Lieut. Lloyd J. Perper (R. 13).

These papers are to be applied only to paragraphs 2 and 3 of the complaint. Charges of needless and reckless risk to life and property are removed from the case by the abandonment of paragraph 1 of the complaint, and by the Board's finding that the evidence did not establish the charges in paragraph 4.

The second and third paragraphs of the complaint are parts of the same transaction. With respect to the second complaint the petitioner denies that he flew over the buildings of the airport (R. 11), and says that he flew close to the control tower "in accordance with standard army practice" in order to attract the attention of the control tower

operator. Perper states (R. 13) that he was acting as an observer and that petitioner "did not maneuver directly above airport buildings nor did he control his airplane in an unsafe manner." Falk wrote to the petitioner "that at no time did you perform any dangerous maneuver" (R. 3-4). Against this statement by the three men who were in the airplane we have only the "Inspector's Report of Violation" by Hamilton (R. 27-29), which has been completely discredited as to the portion of his statement regarding January 13, 1943. And attention should be called to the fact that Falk's statement directly contradicts the charge that petitioner piloted acrobatically, as that terms is defined in the Civil Air Regulations. With respect to the second paragraph of the complaint it is clear that no substantial evidence sustains the order restricting petitioner's pilot certificate.

Paragraph 3 of the complaint alleges descent to an altitude lower than 500 feet "in executing the above mentioned maneuvers." If the statement in paragraph 2 as to acrobatic piloting over buildings is not supported by substantial evidence, findings as to paragraph 3 are also unsupported. Paragraph 3 can only apply to "a dive followed by a steep climbing turn over buildings located on said airport," and the flying over buildings is specifically denied both by petitioner and by Perper. Petitioner's denial is accompanied by his statement that his flight was in accordance with Civil Air Regulations and with the army's flight instructions (R. 11). In any case the absence of substantial evidence is shown in that the only evidence against petitioner is the discredited "Inspector's Report of Violation" by Henry M. Hamilton, which also has no specific reference to the flying lower than 500 feet or any other number of feet (R. 29), other than as an incident to landing. No evidence as to the actual level of low flight appears in the record, and the Civil Aeronautics Board

apparently reached its findings on this matter by conclusions without evidence.

And with respect to acrobatics, a vital charge under both paragraphs 2 and 3 of the complaint, there is no evidence against petitioner, and specific evidence in his favor.

The Circuit Court of Appeals discounts the letters of Perper and Falk as being "framed in general terms" (R. 36), and implies that Perper's statement that "Captain Cameron did not maneuver directly above airport buildings" constitutes a statement that he did maneuver indirectly over such buildings (R. 37). Squadron Leader Falk's letter says that he kept a written account of the flight, and asks: "What on earth do they mean by acrobatic flying; a 30 degree bank?" (R. 4). The Court quotes this as a statement in general terms (R. 36), ignoring the fact that Falk was stating his observation; and the further fact that section 60.152 of the Civil Air Regulations provides that: "A normal bank not in excess of 70 degrees will not be considered as an abrupt change in the aircraft's attitude or as an abnormal attitude."

The function of the Court. The Circuit Court of Appeals takes the position that Dillon's report is that of an eyewitness, although the face of the report appears to indicate the contrary (R. 30, 35); and that obviously false statements by Hamilton as to his observation on January 13 in no way affected his statements in the same report regarding "his observation of what the plane did" on January 20, although the reported observations were similar in character and were obviously prepared with care as to the same party (R. 37). The lower Court says that this was a mere inaccuracy, and bears only on his credibility; and that this Court has determined that the weight and credibility of evidence are for the Board (R. 37). On this basis the lower Court says that "since we believe Hamil-

ton's and Dillon's statements constitute substantial evidence, it is clearly our duty to recognize the Board's finding as conclusive" (R. 37).

Paragraph (e), Section 1006 of the Civil Aeronautics Act of 1938 (U. S. Code, Title 49, Sec. 646, paragraph (e)), provides:

> "The findings of facts by the Board, if supported by substantial evidence, shall be conclusive."

But the Court must find the substantial evidence, and, in doing so, must determine what is evidence; what is its rational probative force, and its adequacy to support a conclusion. It is upon these grounds that the opinion of the Circuit Court of Appeals is here challenged. In these respects the lower Court erred (1) in treating as evidence a report having no such quality; (2) in refusing to consider the probative force of a report false in essential respects; (3) in refusing to consider whether such two reports constitute "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"; and (4) in refusing to consider evidence on behalf of petitioner in determining whether there was sufficient relevant evidence to support the conclusion of the Board.

In *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, the Court said, at page 229:

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

And in *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.,* 306 U. S. 292, p. 300, the Court repeated this statement. In the *Edison* case the Court also said at page 230 that there must be sufficient evidence of "rational probative force" and this statement was quoted with approval in *Federal Security Administrator* v. *Quaker Oats Company,* 318 U. S. 218, 229.

With respect to the Dillon report the lower Court had authority to determine whether Dillon was an eye-witness, and in this respect the issue is equally before this Court as to whether his report was in fact evidence.

With respect to the weight which might be given to the Hamilton report, on the basis of its substantial falsity in part, the lower Court takes the position that the weight and credibility of testimony are finally determined by the administrative body. In support of this view the Court quotes *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 597:

> "The Board, like other expert agencies dealing with specialized fields * * *, has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony."

The *Link-Belt* case was cited with approval in *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 227-228.

The petitioner in this case does not complain of this rule, but objects to its misapplication by the lower Court. Under its view evidence completely lacking credibility must still be regarded as substantial evidence by the Court. Under the view taken by the Circuit Court of Appeals, Hamilton's report as to alleged transactions of January 13 would have constituted substantial evidence sufficient to support the charge in paragraph 1 of the complaint, had that charge not been withdrawn.

This position overlooks certain essential duties of the Court. In the *Link-Belt* case, the Court at page 597 cited with approval the statement in *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 146, that:

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

The basis must be rational. The statute in the present case makes findings of fact conclusive "if supported by

substantial evidence," and "substantial evidence" must be found by the Court. There must be sufficient evidence of "rational probative force." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230, quoted in *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 229. And there must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229, quoted in *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300. If a court has before it an instrument shown by the record to be false or forged it may determine whether such an instrument constitutes adequate evidence to support a conclusion, irrespective of the finding of an administrative body.

The lower court appears to feel that it is bound, by decisions of this Court, to hold (1) that the weight and credibility of testimony are to be finally determined by the Civil Aeronautics Board, thus determining finally whether such testimony is evidence; and (2) that if any evidence of a substantial character is so disclosed, "it is clearly our duty to recognize the Board's findings as conclusive" (R. 37). This constitutes a position that any evidence against petitioner, if substantial, should it stand independently and uncontroverted, is to remain substantial evidence sufficient to support the finding of the Board, irrespective of evidence to the contrary. Evidence may be substantial if uncontroverted and standing alone, and may lose the character of substantiality because of controverting evidence. Otherwise, controverting evidence is futile. The decisions of this Court do not support the position of the Circuit Court of Appeals. This Court has properly said that an administrative determination "must not be set aside because the reviewing court might have made a different determination were it empowered to do so." *Securities and Exchange Commission* v. *Chen-*

ery Corporation, 318 U. S. 80, 94; and see *National Labor Relations Board* v. *Virginia Electric & Power Co.,* 314 U. S. 469, 476. But, in order to be sustained, the finding must be supported by "substantial evidence"; and the standards of such evidence, prescribed by this Court, do not permit a finding unsupported by the record.

Moreover, the rule as to finality in the weight and credibility of testimony is not as controlling here as in a case where witnesses were heard. The evidence in this case is in the form of reports and correspondence, and this Court is in the same position as was the Civil Aeronautics Board in determining the credibility of witnesses. In such a case the rule is not applicable that a court of review will generally accept the findings of a trial court which saw and heard the witnesses. In *United States* v. *Corporation,* 101 Fed. (2d) 156, 160, the Court said that:

> "Instead, this court is equally capable of examining the evidence and drawing conclusions from it, and is under the duty of doing so."

See also *Equitable Life Assur. Soc.* v. *Irelan,* 123 Fed. (2d) 462, 464; and *British American Assurance Co.* v. *Bowen,* 134 Fed. (2d) 256, 260. *Harkin* v. *Brundage,* 276 U. S. 36, 53, goes somewhat further:

> "Ordinarily we should acquiesce in a conclusion of fact by the court that heard the witnesses in such a case, but here the evidence of what was said in the State Court is on a stenographic report agreed upon by the parties, and the other circumstances make the necessary inferences therefrom clear."

The findings of an administrative agency may be of no more weight than those of a trial court, and the petitioner cannot be said to have surrendered a right to a broader review in this respect because he waived his right to hearing before the Civil Aeronautics Board.

Attention may also be given to the fact that the petitioner is penalized for an alleged offense "almost criminal" in

the words of counsel for the Civil Aeronautics Board in the Court below. The penalty may seem slight, but is a serious one for an airplane transport pilot, and should properly receive some of the attention of a criminal case.

In this case the burden has been placed upon petitioner to prove that he is not guilty. Proof of guilt is claimed to have been established by two official reports, one of which is not that of an eye-witness and the other false as to major allegations; and by a refusal to give weight to evidence on behalf of petitioner.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed because that Court is in error in (1) holding petitioner subject to discipline by the Civil Aeronautics Board and (2) holding that the findings of the Civil Aeronautics Board are supported by substantial evidence.

Respectfully submitted,

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